Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	File No. EB-01-IH-0030
	)	
SBC Communications, Inc.	)	NAL/Acct. No. 200232080004
	)	
Apparent Liability for Forfeiture	)	FRN 0004-3051-24, 0004-3335-71,
	)	0005-1937-01

FORFEITURE ORDER

Adopted: October 8, 2002 Released: October 9, 2002

By the Commission:

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), we find that SBC Communications, Inc. ("SBC") willfully and repeatedly violated one of the conditions that the Commission imposed in its order approving the merger application of Ameritech Corp. ("Ameritech") and SBC.[1] Specifically, SBC[2] failed to offer shared transport in the former Ameritech states[3] under terms and conditions substantially similar to those that it offered in Texas as of August 27, 1999, in violation of the *SBC/Ameritech Merger Order*. Based upon our review of the facts and circumstances before us and after considering SBC's response to the Commission's Notice of Apparent Liability ("NAL")[4] in this matter, we conclude that SBC is liable for a forfeiture of six million dollars ($6,000,000.00), the amount we proposed in the NAL.[5]

---

[1] *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) (*"SBC/Ameritech Merger Order"*), *reversed in part on other grounds*, *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

[2] SBC refers to SBC Communications, Inc. and all its affiliates, including its incumbent LECs.

[3] Throughout this Order, we refer to the states located in Ameritech's territory prior to Ameritech's merger with SBC as "the former Ameritech states." These states are: Illinois, Indiana, Michigan, Ohio, and Wisconsin. *See SBC/Ameritech Merger Order*, 14 FCC Rcd at 14719, ¶ 6.

[4] *SBC Communications, Inc., Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 1397 (2002) ("*NAL*").

[5] As we explain below, *see infra* ¶ 23, we find that SBC has committed a separate and distinct violation of this requirement in each of the five former Ameritech states. Each violation is subject to the statutory maximum forfeiture of $1,200,000, resulting in an overall forfeiture of $6,000,000.

II. BACKGROUND

2. In its order approving the merger between SBC and Ameritech, the Commission imposed a condition requiring that, within 12 months of the date of the SBC/Ameritech merger, SBC offer shared transport within the former Ameritech states under terms and conditions substantially similar to, or more favorable than those that SBC was offering to telecommunications carriers in Texas as of August 27, 1999.[6] In the NAL, we found that SBC had apparently repeatedly refused to provide shared transport for intraLATA toll calls, despite the existence as of August 27, 1999 of "at least two interconnection agreements in Texas pursuant to which it offered CLECs the option of using shared transport to route intraLATA toll calls, without restriction, between their end user customers and customers served by SBC."[7] Consequently, we found that SBC had apparently violated the requirements of paragraph 56, and that it was apparently liable for a forfeiture of $6,000,000.[8]

III. DISCUSSION

3. Under section 503(b) of the Act, any person who the Commission determines has willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument of authorization issued by the Commission shall be liable for a forfeiture penalty.[9] In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show in writing why the Commission should not impose such a forfeiture penalty.[10] The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has failed to comply with

---

6 *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56 ("paragraph 56 merger condition" or simply "paragraph 56"). In its entirety, paragraph 56 states:

> Within 12 months of the Merger Closing Date (but subject to state commission approval and the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport), SBC/Ameritech shall offer shared transport in the SBC/Ameritech Service Area within the Ameritech States under terms and conditions, other than rate structure and price, that are substantially similar to (or more favorable than) the most favorable terms SBC/Ameritech offers to telecommunications carriers in Texas as of August 27, 1999. Subject to state commission approval and the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport, SBC/Ameritech shall continue to make this offer, at a minimum, until the earlier of (i) the date the Commission issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that shared transport is not required to be provided by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that shared transport is not required to be provided by SBC/Ameritech in the relevant geographic area.

SBC/Ameritech Merger Order, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56.

7 *NAL*, 17 FCC Rcd at 1399, ¶ 7.

8 *NAL*, 17 FCC Rcd at 1406, ¶ 22.

9 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a).

10 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f).

the relevant requirement.[11] As set forth in more detail below, we conclude under this standard that SBC is liable for a forfeiture for its willful and repeated violations of the *SBC/Ameritech Merger Order*.

4. The issue in this case is whether SBC's refusal to offer shared transport to CLECs in its Ameritech service area for intraLATA toll service violated the conditions of the Commission's approval of SBC's merger with Ameritech. SBC does not deny that it refused to offer shared transport for intraLATA toll calls in the Ameritech states, but instead argues that the paragraph 56 merger condition did not contain a clear requirement that it do so.[12] We find, however, that paragraph 56 is unambiguous and that SBC's arguments to the contrary are unpersuasive. SBC violated the paragraph 56 merger condition at least five times, once in each of the five former Ameritech states, by refusing to offer shared transport to route intraLATA toll calls. Therefore, we affirm the NAL, both as to the violations of paragraph 56 and as to the forfeiture amount.

A. Paragraph 56 of the Merger Conditions Imposed on SBC a Clear Obligation to Provide to CLECs in its Ameritech Region Shared Transport for IntraLATA Toll Service.

5. It is hornbook law that "where [a] regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability."[13] The paragraph 56 merger condition's shared transport requirements are abundantly clear, and "a regulated party acting in good faith would [have been] able to identify, with ascertainable certainty,"[14] its obligation to offer to CLECs in the Ameritech region shared transport for intraLATA toll service. As of October 8, 2000, twelve months after the effective date of the SBC/Ameritech Merger Order, SBC had a legal obligation to offer shared transport in the Ameritech states on terms "substantially similar to (or more favorable than)" the most favorable terms it offered in Texas as of August 27, 1999.[15] On that day in August in Texas, SBC was actually offering shared transport to CLECs who were using that shared transport to provide intraLATA toll service.[16] The plain language of paragraph 56 required SBC to offer that same shared transport for intraLATA toll to CLECs in the Ameritech region as of

[11] *See, e.g., SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002); *Tuscola Broadcasting Co.,* Memorandum Opinion and Order, 76 FCC 2d 367, 371 (1980) (applying preponderance of the evidence standard in reviewing Bureau level forfeiture order). *Cf.* 47 U.S.C. § 312(d) (assigning burden of proof in certain types of hearings to Commission).

[12] *SBC Communications, Inc., Apparent Liability for Forfeiture*, Response of SBC Communications, Inc. to Notice of Apparent Liability for Forfeiture, File No. EB-01-IH-0030 (filed Mar. 5, 2002) ("SBC Response").

[13] *Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

[14] *Id*. at 628.

[15] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56.

[16] SBC does not dispute that it was providing shared transport to CLECs for intraLATA toll calls as of August 27, 1999. In earlier filings, however, SBC argued that it was not "offering" shared transport for intraLATA toll, because it only allowed CLEC use of shared transport on that date because the Texas Public Utility Commission had temporarily enjoined it from refusing to provide this service. *See NAL*, 17 FCC Rcd at 1402-03, ¶ 13. We rejected this contention in the NAL, and we adhere to that ruling now. *Id*.

October 8, 2000.[17] That requirement is clear and simple, and SBC's *post hoc* efforts to muddy the waters cannot justify its failure to comply with the law.[18]

6. SBC argued both prior to the NAL and in response to it that various circumstances and matters of interpretation render paragraph 56 inapplicable, invalid, or insufficiently clear to support the imposition of a forfeiture. As much of SBC's response to the NAL consists of restatement of the arguments that it made previously and that we resolved in the NAL, we will not repeat our analysis of each argument. Rather, we incorporate and adopt here the reasoning and conclusions we set forth in the NAL.[19] We address below SBC's new or newly expanded-upon arguments.

[17] *NAL*, 17 FCC Rcd at 1402, ¶ 13 n.28. In the NAL, we noted that (1) SBC's interconnection agreements in Texas memorialized its obligation to offer shared transport for intraLATA toll; (2) that obligation existed before, during, and after August 1999; (3) SBC was in fact offering shared transport for intraLATA toll before, during, and after August 1999 pursuant to its interconnection agreements and a Texas PUC Interim Order; and (4) the Texas PUC confirmed in a November 1999 ruling resolving a dispute between SBC and two CLECs that SBC's interconnection agreements obliged it to offer shared transport for intraLATA toll before, during, and after August 1999. *Id*. ¶¶ 7, 9, 11 (citing *Birch Telecom of Texas, Ltd., LLP v. Southwestern Bell Tel. Co*., Order Issuing Interim Ruling Pending Dispute Resolution, Docket Nos. 20745 & 20755 at 3 (Pub. Util. Comm'n of Texas, Apr. 26, 1999); *Complaint of Birch Telecom of Texas, LTD., L.L.P. and Alt Communications, L.L.C. Against Southwestern Bell Telephone Company For Refusal to Provide IntraLATA Equal Access Functionality, and Complaint of Sage Telecom, Inc. Against Southwestern Bell Telephone Company For Violating Unbundled Network Elements Provisions of the Interconnection Agreement,* Arbitration Award, Docket Nos. 20745 and 20755 (Pub. Util. Comm'n of Texas, Nov. 4, 1999) ("*Texas Arbitration Award*"); *Complaint Of Sage Telecom, Inc. Against Southwestern Bell Telephone Company For Violating Unbundled Network Elements Provisions Of The Interconnection Agreement*, Docket No. 20755, and *Complaint Of Birch Telecom Of Texas, Ltd., L.L.P. And ALT Communications, L.L.C. Against Southwestern Bell Telephone Company For Refusal To Provide IntraLATA Equal Access Functionality*, Order, Docket 20745 (Pub. Util. Comm'n of Texas, Dec. 1, 1999) (approving the arbitration award)).

[18] This case is wholly different from the cases to which SBC cites and from other similar cases assessing the constitutionality of agency actions involving deprivation of property based on civil liability. Courts have found administrative rules to be so unclear as to preclude forfeiture or other similar action in a variety of circumstances, but not in circumstances similar to those present in this case, where a rule or order establishes clearly the obligations of the regulated entity. *See, e.g., Trinity Broadcasting of Florida v. FCC*, 211 F.3d at 618 (where the FCC failed to provide a relevant definition for a key regulatory term, regulated entity's reliance on the FCC's prior interpretation of that term as it appeared in a different but similar regulation was reasonable); *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995) (scope of regulation was not clear when, among other things, the agency's interpretation of a key term in the regulation was contrary to its ordinary meaning; the regulation was ambiguous on its face as to whether the conduct was prohibited; and different divisions of the enforcing agency disagreed about the meaning of the regulation); *Rollins Environmental Services, Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991) (although the EPA's interpretation of the regulation was permissible, forfeiture was improper where the regulation was ambiguous and significant disagreement existed among EPA's various offices regarding the proper interpretation of the language); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976) (citations improper where, *inter alia*, there was disagreement among OSHA compliance officers as to whether the regulation applied to conduct at issue).

[19] *NAL*, 17 FCC Rcd 1397 (2002).

1. The *Texas Arbitration Award* supports the conclusion that SBC offered shared transport for intraLATA toll service as of August 27, 1999.

7. In the NAL, we relied in part on a November 4, 1999 ruling by an arbitration panel of the Texas PUC concerning SBC's shared transport obligations to support our conclusion that SBC was offering shared transport for intraLATA toll service in Texas as of August 27, 1999.[20] SBC contends that we misinterpreted the Texas PUC's ruling, and that our interpretation of the company's paragraph 56 federal obligation is therefore flawed.[21] SBC argues that the *Texas Arbitration Award* addressed SBC's obligation to provide access to combinations of unbundled network elements ("UNEs"), not shared transport, and thus is not relevant in interpreting the scope of SBC's shared transport offering in Texas. Specifically, SBC asserts that:

> insofar as it relied upon agreement language at all, the Texas PUC focused primarily on the language mandating access to UNE combinations – in particular, section 2.4.1. in Attachment 6 of the agreement, which "requires SWBT to provide the CLEC with all the functionality of a combination of UNEs." In the Texas PUC's view, because that language required Southwestern Bell to provide UNE functionality equivalent to what "SWBT [wa]s providing to itself . . . without restriction," it followed that Southwestern Bell had to permit CLECs to route intraLATA toll calls in the same manner that Southwestern Bell did [i.e., using shared transport].[22]

We find SBC's argument to be unpersuasive for a number of reasons, and we reaffirm our conclusion that the *Texas Arbitration Award* clearly stated SBC's obligation to provide shared transport for intraLATA toll calls.

8. In the Texas arbitration, two CLECs, Sage and Birch, were asserting their right to use a combination of local switching and shared transport, plus unbundled local loops and tandem switching, to transport intraLATA toll calls.[23] That the Texas Commission ordered SBC to provide this particular combination of UNEs necessarily means that SBC was obligated to provide each of the individual UNEs.[24] Thus, the *Texas Arbitration Award's* discussion of UNE combinations does nothing to undermine our conclusion that the Texas PUC found that SBC was obligated to continue offering shared transport for intraLATA toll calls.[25]

---

[20] *NAL*, 17 FCC Rcd at 1402-03, ¶¶ 11-13. The Arbitration Award subsequently was approved by the Texas Commission on December 1, 1999. *See id.* at 1402, ¶ 11.

[21] SBC Response at 26-27.

[22] SBC Response at 26 (citation omitted).

[23] *Texas Arbitration Award* at 2-3, 5-7.

[24] *Texas Arbitration Award* at 12-13.

[25] *See NAL*, 17 FCC Rcd at 1403-04, ¶ 14 & n.34. SBC's argument about how other state commissions might interpret the language in its Texas interconnection agreements is irrelevant to our analysis. *See* SBC Response at 27. The Texas PUC's ruling confirmed that SBC was obliged to and did offer shared transport for

9. Moreover, we note that the *Texas Arbitration Award* specifically states that "[t]he use of the common transport UNE, or any other UNE, for that matter, cannot be limited in any way by the type of traffic that passes through it."[26] This ruling further undermines SBC's argument that its Texas offering allowed it to restrict the use of shared transport for intraLATA toll calls.

10. Regardless, the *Texas Arbitration Award* makes clear that SBC had been offering shared transport for intraLATA toll for some time prior to August 1999 pursuant to its interconnection agreements, and that it sought to stop doing so in April 1999 on the grounds that the implementation of federal dialing parity rules somehow eliminated its obligation to do so.[27] The *Texas Arbitration Award* explicitly rejected SBC's dialing parity argument, which necessarily means that the earlier obligation remained in place on August 27, 1999.[28] In any event, on August 27, 1999, SBC was in fact offering shared transport for CLECs to use for intraLATA toll service.[29] Therefore, even if we assume *arguendo* that before the *Texas Arbitration Award* SBC held a good faith belief that paragraph 56 of the merger conditions did not encompass intraLATA toll traffic, that belief was unreasonable after the Texas PUC decision. Paragraph 56 expressly links SBC's obligations in the Ameritech states to its service offerings in Texas, and the *Texas Arbitration Award* confirmed with clarity that shared transport for intraLATA toll traffic was within the scope of those service offerings. That simple fact alone triggered SBC's paragraph 56 obligation to offer shared transport for intraLATA toll service to CLECs in the Ameritech region.

11. SBC's effort to inject a confused interpretation of the Texas PUC orders into an otherwise clear picture of the company's obligations is unpersuasive. It does not alter our conclusion that SBC was offering shared transport for intraLATA toll calls in Texas on August 27, 1999, and that it was therefore subsequently obliged to do the same in the Ameritech region.

2. The shared transport obligation contained in the paragraph 56 merger condition includes shared transport for intraLATA toll service.

12. Paragraph 56 of the merger conditions does not impose or permit any restriction on the type of services for which CLECs may use shared transport. SBC argues in its response to the NAL, as it did in previous pleadings, that the paragraph 56 merger condition does not

---

intraLATA toll in Texas during August, 1999. Paragraph 56 required SBC to do the same in the Ameritech region. SBC's focus on how other state commissions might interpret the language from the Texas interconnection agreements is entirely misplaced. Paragraph 56 does not bind SBC to offer that particular contract language in other states, but to fulfill the obligation embodied in that language pursuant to which it must offer shared transport in the former Ameritech states.

[26] *Texas Arbitration Award* at 39. The term "common" transport as the Texas PUC used it in the *Texas Arbitration Award* is synonymous with the term "shared" transport that we used in the Merger Order. SBC does not argue to the contrary.

[27] *Texas Arbitration Award* at 2-3.

[28] *Texas Arbitration Award* at 14.

[29] *NAL*, 17 FCC Rcd at 1400-01, ¶¶ 9-12.

apply to intraLATA toll traffic, because "SBC's understanding [is] that the Merger Conditions' shared-transport obligation is a purely local one."[30] Similarly, SBC asserts that the general shared transport obligation that we established in the *UNE Remand Order* applies only when the CLEC intends to provide a local service.[31] SBC seemingly cites to every use of the word "local" in Commission orders addressing shared transport to argue that the Commission's use of this word in various contexts indicates its intent to limit any shared transport obligation to "local" traffic, which, according to SBC, does not include intraLATA toll.[32] As we did in the NAL,[33] we find these arguments to be without merit. We incorporate our reasoning and conclusion there,[34] but also take this opportunity to address SBC's argument in more detail.

13. Paragraph 56 requires SBC to offer shared transport in the former Ameritech states under similar or more favorable conditions than those SBC offered in Texas. This language is inclusive and contains no exclusions. It does not in any way limit the purposes for which a CLEC may use shared transport.[35] SBC places great weight on the argument that the paragraph 56 shared transport obligation is limited by what SBC asserts is the view that we expressed elsewhere that CLECs may only use shared transport for local service. IntraLATA toll, SBC contends, is not a local service and does not affect local competition.[36] But neither the

[30] SBC Response at 10. SBC submitted a series of declarations signed by various SBC personnel who assert that their understanding was that the purpose of the shared transport merger condition was "to permit CLECs in the Ameritech region to use shared transport for *local* exchange and exchange access, not for long-distance calling." SBC Response at 25 (emphasis in original). These self-interested declarations, however, cannot serve to contradict the plain language of the merger condition. Our interpretation of that condition, set forth at paragraph 5 above, is entirely straightforward, and the language of the condition admits no reasonable contrary interpretation.

[31] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

[32] *See infra* n.45.

[33] 17 FCC Rcd at 1404-05, ¶¶ 17-18.

[34] *NAL*, 17 FCC Rcd 1397 (2002).

[35] SBC argues that the Commission must have intended to limit the shared transport requirement to local services, because otherwise there would be "no limitation at all on an incumbent LEC's obligation to unbundle common transmission facilities." SBC Response at 13. By way of example, SBC contends that under such a reading, Sprint would have to unbundle all of its long-distance facilities throughout any state in which it is an incumbent LEC. *Id*. SBC is mistaken, however; the unrestricted nature of the shared transport obligation does not lead to such a scenario. Although paragraph 56 does not restrict the use of the shared transport UNE to intra LATA services, as a practical matter shared transport is not generally available for interLATA, interexchange traffic. Incumbent LECs are not required to provide shared transport between incumbent LEC switches and serving wire centers, which is how an incumbent LEC typically routes interLATA, interexchange traffic in its network. *See 1997 Shared Transport Order*, 12 FCC Rcd at 12478, ¶ 29; *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14226-27, ¶¶ 8-10 (1999). In addition, Commission rules generally prohibit an incumbent LEC from jointly owning interexchange transmission facilities with its long distance affiliate. *See, e.g.*, 47 C.F.R. § 64.1903(a)(2) (stating that incumbent independent LECs may not jointly own transmission facilities with their in-region, interexchange services affiliates). An incumbent LEC's long distance network must be independent from its local networks, and, therefore, as a practical matter, competitive LECs cannot use the shared transport UNE to transit traffic beyond the LATA boundary.

[36] SBC Response at 10-16, 19-25.

text of paragraph 56 nor the Act and our rules provide for or permit SBC to limit CLECs' use of the shared transport UNE, and the references SBC cites elsewhere that use the word "local" in reference to traffic, switches, and markets are beside the point.

14. The broad swath of paragraph 56 comports with section 251(c)(3) of the Act, which requires incumbent LECs to provide nondiscriminatory access to network elements, "to any requesting carrier for the provision of *a telecommunications service*."[37] In implementing section 251(d)(2) and (c)(3), we identified the *network elements* — that is, the physical *facilities* and their "features, functions and capabilities" — that the incumbent LEC must provide to the requesting carrier, not the purposes for which a CLEC may use those facilities.[38] Specifically, rule 51.319(d) defines shared transport as "transmission *facilities* shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network."[39] This definition requires incumbent LECs to provide these shared transport facilities "to *any* requesting telecommunications carrier . . . for the provision of *a telecommunications service.*"[40] It contains no limitation on the type of telecommunications service that the requesting carrier may provide, and therefore it contains no limitation on use of these facilities to transport intraLATA toll traffic.[41] A "telecommunications carrier" includes a carrier who provides intraLATA toll service, and "telecommunications service" includes intraLATA toll service.[42] Thus, rule 51.319(d) makes clear that *any* requesting telecommunications carrier may use the shared transport UNE for *any* "telecommunications service" it chooses to provide — including intraLATA toll service.[43] Indeed, as we stated in the NAL, as a general matter, the Commission's rules explicitly prohibit use restrictions on UNEs.[44]

[37] 47 U.S.C. § 251(c)(3). This provision was codified almost verbatim at section 51.307(a) of the Commission's rules, 47 C.F.R. § 51.307(a).

[38] *See* 47 U.S.C. § 153(29) (a "network element" is "a facility or equipment used in the provision of a telecommunications service . . . .").

[39] 47 C.F.R. § 51.319(d)(iii) (emphasis added). Rule 51.319 was promulgated in the *UNE Remand Order*, 15 FCC Rcd at 3936-51.

[40] 47 C.F.R. § 51.319(d) (emphasis added).

[41] *See UNE Remand Order*, 15 FCC Rcd at 3864, ¶ 374 (finding a requesting carrier's ability "to provide the services it seeks to offer" would be impaired without access to shared transport); *id.* at 3842, ¶ 321 (same).

[42] *See* 47 U.S.C. § 153(43) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing . . ."); 47 U.S.C. § 153(44) (defining "telecommunications carrier" as "any provider of telecommunications services"); and 47 U.S.C. § 153(46) (defining "telecommunications service" as "the offering of telecommunications . . .").

[43] *See also* 47 C.F.R. 51.307(a) ("An incumbent LEC shall provide [UNEs], to a requesting telecommunications carrier for the provision of a telecommunications service . . .").

[44] 47 C.F.R. 51.309(a) ("[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.") Where we impose or permit use restrictions on UNEs, we do so explicitly, as we did with our rules limiting the use of enhanced extended links ("EELs"). *See Implementation of the Local Competition*

15. Because of the clarity of the language of paragraph 56 and of the Act and rules, we need look no further to determine SBC's obligation. Because we find that there is no limitation on SBC's shared transport obligation, SBC's arguments about the nature of intraLATA toll traffic are irrelevant. It matters not whether intraLATA toll is properly characterized as being inherently local in nature or whether competition in intraLATA toll affects competition in local markets. However, we note that SBC overreaches in attempting to characterize various statements in our orders as being indicative of a view that shared transport cannot extend to intraLATA toll because the "local" nature of that obligation is necessarily exclusive of intraLATA toll service.[45] Nothing in the passages to which SBC cites supports that view.[46] Indeed, we have made statements in other circumstances that establish our view that

Provisions of the Telecommunications Act of 1996, Supplemental Order, 15 FCC Rcd 1760 (1999); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000). The Commission has not adopted any restriction on the use of shared transport, and therefore under rule 51.309(a) the requesting carrier may use the shared transport UNE to provide intraLATA toll or any other telecommunications service it seeks to provide.

[45] SBC's overreaching in this regard extends to its reliance on a California state commission decision as well. SBC cites to a California state commission order that SBC says adopted the position that "[c]ompletion of end-user calls over [the incumbent LEC's] intraLATA toll network is not part of the shared transport UNE under the FCC's *UNE Remand Order*." SBC Response at 21, citing *Application of AT&T Communications of California, Inc. (U 5002 C) et al., for arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Final Arbitrator's Report, A.00-01-022, at 118-19 (Cal. P.U.C., June 13, 2000). SBC's characterization of the California PUC's holding in this proceeding is misleading and incorrect. Although the arbitrator did adopt the incumbent's position on the substantive issue in question, it was not on the grounds that SBC suggests. In fact, consistent with our conclusion that SBC is required to offer shared transport for routing intraLATA toll calls, the California PUC held that AT&T was entitled to use shared transport to route its intraLATA toll traffic over the incumbent LEC's network, as long as it is used in combination with unbundled switching. Specifically, the California PUC concluded that, when a competing carrier purchases unbundled switching from an incumbent LEC, "that function, in combination with shared transport, can be used to route . . . intraLATA toll traffic." Therefore, even this state decision that SBC uses in an effort to blur the clarity of paragraph 56 rejects SBC's position that shared transport excludes intraLATA toll traffic.

[46] SBC points to the Commission's statement that "access to transport facilities on a shared basis is particularly important for stimulating initial competitive entry into the local exchange market, because new entrants have not yet had an opportunity to determine traffic volumes and routing patterns." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12482, ¶ 35 (1997) ("*1997 Shared Transport Order*"). SBC also quotes the Commission's statement that "the only carrier that would need shared transport facilities would [be] one that was using an unbundled local switch," and maintains that this statement, too, was meant to limit the shared transport obligation to local traffic. SBC Response at 12, citing *1997 Shared Transport Order* at 12488, ¶ 47 n.127. According to SBC, these statements indicated the Commission's intent to "stimulate competition in the local market," and thus to exclude intraLATA traffic from the shared transport obligation. SBC Response at 12. The company also relies on paragraph 56 itself, which applies to the obligation "to provide unbundled local switching and shared transport." SBC Response at 11, quoting *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56. None of the statements SBC cites contradicts the plain meaning of our rules regarding the obligation to provide the shared transport UNE, or, for that matter, even addresses the nature or scope of the shared transport obligation. Moreover, SBC's repeated citation to the use of the term "local" in reference to the "switch" seems to imply a limitation on the Commission's rules providing for broad use of the switching UNE. To the contrary, when we use the word "local" in conjunction with the word "switch," the former is a term descriptive of the physical switching facility itself and not the services for which a carrier may use the switch. As we concluded in the NAL, and as we explain in the instant Order, neither paragraph 56 nor the Commission's rules limit the use of the shared transport UNE to a particular type of telecommunications service. In addition, despite SBC's assertions

intraLATA toll traffic does affect local competition.[47] For these reasons, we reject any implication that we have expressed differing views at different times about whether the shared transport obligation extends to use of the UNE for intraLATA toll. To the extent SBC relies on such a suggestion in support of its argument that paragraph 56 lacked sufficient clarity to provide adequate notice of its obligation, we reject that notion.[48] In any event, as we explained above, the plain and unambiguous language of paragraph 56 renders these other statements irrelevant.

16. For these reasons, and for the reasons we articulated in the NAL, SBC's overly restrictive interpretation of the paragraph 56 shared transport obligation as being exclusive of shared transport for intraLATA toll service is unreasonable.

3. The Merger Conditions' paragraph 56 shared transport obligation is unaffected by the Commission's *UNE Remand Order*.

17. The paragraph 56 merger condition is "subject to . . . the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport." SBC argues again, as it did before the NAL, that the Commission's *UNE Remand Order* is a "future Commission order," that it does not require SBC to provide shared transport for intraLATA toll, and that it therefore eliminated any merger condition requirement to offer shared transport for intraLATA toll. We reject this argument for several reasons, some of which we stated previously in the NAL, and incorporate here.[49]

18. As an initial matter, the shared transport rules that we adopted in the *UNE Remand Order* plainly require unbundling of shared transport for use with intraLATA toll traffic. As we explained above, the language of the Act and of the *UNE Remand Order* and our rules is clearly and unambiguously inclusive and does not permit SBC to make exclusions based on the services for which a requesting carrier might use a UNE.[50] Therefore, paragraph 56 is fully consistent with the *UNE Remand Order.*

---

to the contrary, and as we note in the following footnote, we have previously stated that intraLATA toll service affects competition in the local market.

[47] In the order denying Ameritech's section 271 application for the state of Michigan, we addressed allegations that Ameritech was refusing to provide intraLATA toll service to CLEC customers, and we emphasized our "concerns that discontinuing or refusing to offer *intraLATA toll service* to customers that elect to switch to another local service offer may threaten a competing LEC's ability to compete effectively in *the local market* and thus may be inconsistent with the procompetitive goals of the 1996 Act." *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20738-40, ¶¶ 377-378 (1997). *See also id.* at 20738, ¶ 377 (expressing "concerns that Ameritech is effectively stifling competition in the *local exchange market* by refusing to provide *intraLATA toll service* to competing LEC customers") (emphasis added).

[48] SBC Response at 8-9, 33 (*citing Trinity Broadcasting of Florida v. FCC*, 211 F.3d at 618; *General Electric Co. v. EPA*, 53 F.3d at 1328).

[49] *NAL*, 17 FCC Rcd at 1405, ¶ 18.

[50] *See supra* ¶¶ 13-14.

19. Moreover, although we adhere to our view that the earlier adopted *UNE Remand Order* was not a "future" order,[51] that finding is not essential to our ruling here. Regardless of the relationship of that Order's release, adoption, and effective date to the effective date of the Merger Conditions,[52] it only supports and does not in any way undermine the enforceability of SBC's obligation pursuant to paragraph 56 to provide shared transport for intraLATA toll service. The paragraph 56 obligation is "subject to" the terms of a future Commission order, which can only mean that the shared transport obligation of paragraph 56 will remain in place until the merger condition sunset date, unless the terms of another order directly contravene it. We have issued no such order. Moreover, paragraph 56 expressly provides its own merger condition sunset date,[53] stating that this obligation shall remain in effect unless and until either the Commission were to find in the UNE Remand proceeding that SBC is not required to provide shared transport, or a court were to issue a final non-appealable order to that effect.[54] Neither of those events has occurred.[55] Therefore, SBC's arguments about the impact of the *UNE Remand Order* on the paragraph 56 obligation are unavailing.

B. SBC Did Not Substantially Comply with the Paragraph 56 Condition.

20. SBC argues that section 503(b) of the Act does not support a forfeiture here because any requirement that SBC offer shared transport for intraLATA toll calls was "tangential to the primary purpose of the condition," and thus, SBC did not fail *substantially* to comply with the paragraph 56 merger condition.[56] We recognize that in adopting paragraph 56 we focused on requiring SBC to reverse Ameritech's practice of refusing to offer any shared transport whatsoever, a practice that was contrary to our local competition rules. The fact that SBC instead chose to refuse to offer only a subset of shared transport does not render its violation insubstantial. For those CLECs seeking intraLATA toll shared transport, SBC's refusal to offer it was anti-competitive and thus significant. Accordingly, we find that SBC failed substantially to comply with paragraph 56.

C. SBC's Actions Were Willful and Repeated.

21. Pursuant to section 503(b)(1) of the Act, any person that willfully or repeatedly fails to comply substantially with the terms and conditions of any license, permit, certificate, or

[51] *NAL*, 17 FCC Rcd at 1404-05, ¶ 17.

[52] SBC response at 16-17.

[53] The merger condition sunset provision of general applicability provides for independent sunsets for particular conditions. *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14858, ¶ 359. The paragraph 56 shared transport obligation sunset provision is conditioned on the events we describe in text, rather than on a particular date.

[54] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56.

[55] The recent D.C. Circuit Court decision in *United States Telecom Association, et al. v. FCC, et al.*, 290 F.3d 415 (2002), does not undermine our analysis. The court did not vacate the *UNE Remand Order*.

[56] 47 U.S.C. § 503(b)(1)(A). Specifically, section 503(b)(1) states, in pertinent part: "[a]ny person who [has] willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission . . . shall be liable to the United States for a forfeiture penalty." *Id*.

other instrument or authorization issued by the Commission, shall be liable to the United States for a forfeiture penalty.[57] It has long been established that the word "willfully," as employed in section 503(b) of the Act, does not require a demonstration that a party knew it was acting unlawfully,[58] but only that it knew it was committing the acts in question consciously and deliberately, and that the acts were not accidental. SBC does not contest the NAL's tentative conclusion that it intentionally and affirmatively refused to offer shared transport for intraLATA toll in the five former Ameritech states. We thus find that SBC's behavior was willful.[59]

D. Forfeiture Amount

22. SBC's willful and repeated failure to comply with the *SBC/Ameritech Merger Order* justifies a substantial forfeiture in this case.[60] Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to $120,000 for each violation, or each day of a continuing violation, up to a statutory maximum of $1,200,000 for a single act or failure to act.[61] In determining the appropriate forfeiture amount, we consider the factors set forth in section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[62]

23. We impose a forfeiture of $6,000,000, the amount initially proposed in the NAL. This figure represents the statutory maximum for five continuing violations lasting at least ten days each during the period prior to the NAL. We find that SBC's conduct represents five

---

[57] 47 U.S.C. § 503(b)(1)(A); *see also* 47 C.F.R. § 1.80(a)(1).

[58] *See, e.g.,* 47 U.S.C. § 312(f)(1) (defining willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission"); *Southern California Broadcasting* Company, 6 FCC Rcd 4387, 4388 (1991) (discussing legislative history of section 312(f)(1) and its applicability to section 503(b) forfeiture proceedings); *Liability of Chesapeake Broadcasting Corp., Licensee of AM Radio Station WASA, Havre de Grace, MD, for a Forfeiture*, Memorandum Opinion and Order, 2 FCC Rcd 252, 253, ¶¶ 9-10 (1987) (stating that, in the forfeiture context, willfulness is not "an intent to deceive the Commission or to violate the Act or the Rules.").

[59] The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Montary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or if it lasts more than one day. *Southern California Broadcasting Co., Licensee, Radio Station KIEV(AM) Glendale, California*, 6 FCC Rcd 4387, 4388, ¶ 5 (1991); *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd at 1362, ¶ 9. In this case, SBC refused to comply with multiple requests for shared transport to route intraLATA calls in each of the former Ameritech states, and for more than one day on each occasion. Thus, the acts addressed here were repeated as well as willful, and support a forfeiture on those grounds as well.

[60] *NAL*, 17 FCC Rcd at 1405-06, ¶ 20.

[61] 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R. § 1.80(b)(2); *see also Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000).

[62] 47 U.S.C. § 503(b)(2)(D); *see also The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17100 (1997) ("*Forfeiture Policy Statement*"); *recon. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

separate and distinct violations of the Merger Conditions, one for each state in which it refused to offer shared transport to requesting carriers for intraLATA toll traffic.

24. SBC argues that the amount of the forfeiture is excessive, but we find that it is fully justified. SBC has repeatedly violated the clear terms of the merger condition. In state after state, throughout the Ameritech region, SBC forced competing carriers to expend time and resources in state proceedings trying to obtain what SBC was already obligated to offer, causing delays in the availability of shared transport. Thus, the potential competitive impact of SBC's violations is substantial, and warrants a significant penalty. In addition, the Commission has made clear that it will take into account a violator's ability to pay in determining the amount of a forfeiture so that forfeitures against "large or highly profitable entities are not considered merely an affordable cost of doing business."[63] In 2001, SBC had total operating revenues of nearly $46 billion.[64] For a company of this size, a $6,000,000 forfeiture is not excessive. Indeed, a smaller forfeiture would lack adequate deterrent effect.

25. SBC makes a variety of specific arguments about the forfeiture amount, none of which we find persuasive. SBC complains that the NAL did not apply a base forfeiture amount, and asserts that "[t]he NAL's failure to rely on [the forfeiture] guidelines, or at least to explain its deviation from them, is unlawful."[65] First, we note that the forfeiture guidelines contain no base amount for the violation at issue here; thus there was no base amount to apply. In any event, the Commission has discretion to depart from the guidelines where appropriate,[66] and we explained fully the basis for the proposed forfeiture in the NAL.

26. SBC also argues that the maximum forfeiture in this case is $1.2 million, *i.e.*, the statutory maximum for a single continuing violation.[67] SBC's reasoning is that paragraph 56 creates a single obligation,[68] that it complied with that obligation by the single act of deploying an AIN-based shared transport solution throughout its region, and that if it imposed any unwarranted limitation on its shared transport offering, it did so only once when it first made shared transport available in the Ameritech region.[69] We reject SBC's characterization of the facts. The merger conditions obligate SBC to "offer shared transport . . . within the Ameritech States under terms and conditions, other than rate structure and price, that are substantially similar to (or more favorable than) the most favorable terms" offered in Texas on August 27,

[63] *Forfeiture Policy Statement*, 12 FCC Rcd at 17099-100.

[64] *SBC 2001 Annual Report* at 4.

[65] SBC Response at 31.

[66] *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17101, ¶ 29 (1997).

[67] SBC Response at 31-32.

[68] SBC describes its obligation as simply "to provide AIN-based shared transport throughout the Ameritech region by October 8, 2000." SBC Response at 32. SBC substantially understates the extent of its obligation. Nothing in the *SBC/Ameritech Merger Order* indicates that SBC's only obligation was to implement an AIN-based system. SBC is obligated to provide shared transport under terms and conditions – *all* terms and conditions (except for pricing) substantially similar to or better than those it offered in Texas.

[69] SBC Response at 32.

1999. The record shows that at least five times, once in each of the Ameritech states, a competing carrier requested the use of shared transport to route intraLATA toll traffic.[70] Each of those requests obligated SBC to offer shared transport in compliance with the merger condition. In each of those instances, SBC refused to offer the requested UNE. Thus, each of those instances constituted a separate, continuing violation of the merger conditions. By SBC's theory, having once refused to make available shared transport on the required terms, it could continue to refuse all requests with impunity and suffer no further consequences. We will not adopt such a skewed reading.

27. Finally, SBC asserts that the forfeiture amount is excessive because intraLATA toll is "far afield from the central purpose of paragraph 56," and because the amount fails to recognize that SBC complied with some portion of the shared transport merger conditions.[71] We find neither of these points persuasive. First, as indicated above, we believe that SBC's violations did relate to local competition. In addition, as discussed above in rejecting SBC's argument that it has "substantially" complied with the conditions, we do not find it reasonable to

[70] The records of proceedings in each of the five Ameritech states document these requests, as well as SBC's refusal to honor them. *See, e.g.*, *Investigation Into Tariff Providing Unbundled Local Switching With Shared Transport*, Order, Case No. 00-0700 (Ill. Commerce Comm., Nov. 1, 2000), Exhibit 1(v) to Sworn Statement of Deborah A. Golden ("Golden Exhibit"), submitted with Letter from Sandra L. Wagner, SBC Telecommunications, Inc., to Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, dated May 2, 2001 ("SBC May 2 Response") (investigating an Illinois Bell Telephone Company tariff on the issue of whether Ameritech's restrictions on the shared transport offering are appropriate, and specifically whether shared transport should be available for use by CLECs in transporting their intraLATA toll traffic); *AT&T Communications of Indiana, Inc. TCG Indianapolis Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Indiana Bell Telephone Company, Inc. d/b/a Ameritech Indiana Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Ameritech Indiana's Submission of Proposed Order, Cause No. 40571-INT-03 at 69-71 (Ind. Util. Reg. Comm'n, filed Oct. 10, 2000), Golden Exhibit 1(b) of SBC May 2 Response (proposed ruling that Ameritech should be permitted to prohibit AT&T's use of shared transport for intraLATA toll traffic); *AT&T Communications, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, Ameritech Ohio's Response to AT&T's Petition for Arbitration, Case No. 00-1188-TP-ARB at 19 (Pub. Util. Comm'n of Ohio, filed July 25, 2000), Golden Exhibit 1(k) of SBC May 2 Response (arguing that AT&T should not be permitted to use shared transport for intraLATA toll traffic; *Application of Ameritech Michigan for Approval of a Shared Transport Cost Study and Resolution of Disputed Issues Related to Shared Transport*, Ameritech Michigan's Reply Brief, Case No. U-12622 (Mich. Pub. Serv. Comm'n, filed December 28, 2000) (defending a tariff filing that prohibited use of shared transport for intraLATA toll service); Ameritech Michigan's Exceptions to the Proposal for Decision at 4-8 (filed February 12, 2001), Golden Exhibit 1(h) of SBC May 2 Response (arguing that the Merger Order does not require Ameritech to allow the use of shared transport for intraLATA toll service); *Petition for Arbitration to Establish an Interconnection Agreement Between Two AT&T Subsidiaries, AT&T Communications of Wisconsin, Inc. and TCG Milwaukee, and Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin)*, Ameritech Wisconsin's Initial Post-Hearing Brief, Docket No. 05-MA-120 at 74 (Pub. Serv. Comm'n of Wisconsin, filed September 22, 2000), Golden Exhibit 1(o) of SBC May 2 Response (arguing that Ameritech may prohibit AT&T's use of shared transport for intraLATA toll traffic).

[71] SBC reminds us that it deployed an Advanced Intelligent Network-based shared transport product as required by the *SBC/Ameritech Merger Order*, and concludes that "[t]he Commission's resort to the statutory maximum is thus wholly out of proportion to what SBC is alleged to have done wrong, and fails entirely to acknowledge what it has done right." SBC Response at 32. However, the mere act of compliance with one portion of the law does not insulate SBC from the consequences of significant noncompliance with a different portion of the law. Regulated entities must comply with all requirements, and should expect significant enforcement action where, as here, there is significant noncompliance.

focus on the "proportion" of the condition that has been violated, but rather on the scope and potential impact of SBC's violations. The fact that SBC may have properly offered shared transport for local non-toll traffic does not mitigate its refusal to offer shared transport for intraLATA traffic.

28. For all of the reasons we have discussed above, we find that SBC's conduct justifies the forfeiture amount that we proposed in the NAL. We therefore affirm the $6,000,000 forfeiture amount originally proposed.

IV. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED THAT, pursuant to section 503(b) of the Act,[72] and section 1.80 of the Commission's rules,[73] SBC Communications SHALL FORFEIT to the United States Government the sum of six million dollars ($6,000,000.00) for willfully and repeatedly violating the Commission's merger conditions in the *SBC/Ameritech Merger Order*.

30. IT IS FURTHER ORDERED that payment shall be made in the manner provided for in section 1.80 of the Commission's rules within thirty (30) days of release of this order.[74] If the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.[75]

31. IT IS FURTHER ORDERED that a copy of this Order of Forfeiture shall be sent by Certified Mail/Return Receipt Requested to SBC Communications, c/o Michelle Thomas, Executive Director – Federal Regulatory, 1401 I Street, N.W., Suite 1100, Washington, D.C. 20005.

Federal Communications Commission

Marlene H. Dortch
Secretary

[72] 47 U.S.C. § 503(b).

[73] 47 C.F.R. § 1.80.

[74] *Id*.

[75] 47 U.S.C. § 504(a).